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In The

Supreme Court of the United States

October Term, 1949

No. 693

Safeway Stores, Inc., *a corporation, Petitioner,*
v.
Elizabeth West, Vester West, *Respondents.*

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

OPINION BELOW

The United States District Court for the District of Columbia rendered no opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit has not been reported but is printed in the record (R. 108)

JURISDICTION

The jurisdiction of this Court is based upon Section 240(a) of the Judicial Code as Amended, Title 28, USCA, Section 1254 (1).

QUESTIONS PRESENTED

1. **Is the Doctrine of Res Ipsa Loquitor Applicable to the Case at Bar?**
2. **Did the Trial Court Below Commit Error in Failing to Submit the Question of Contributory Negligence to the Jury?**

STATEMENT OF THE MATTER INVOLVED

In correcting certain omissions in the statement contained in the petition filed herein, respondents refer to their counter-statement of the case found in brief of the appellees filed in the United States Court of Appeals for the District of Columbia Circuit, Page 1.

SUMMARY OF ARGUMENT

1. **There Is No Claim in Petition for Certiorari, That Any Federal Question Is Involved.**
2. **The Petition for Certiorari Incorrectly Alleges That the United States Court of Appeals for the District of Columbia Misconceived the Law of Res Ipsa Loquitur in the Applicable Decisions of This Court and Misapplied the Law to the Facts in This Case.**

ARGUMENT

1. **There Is No Claim in Petition for Certiorari, That Any Federal Question Is Involved.**

Since this is a case raising purely a question of local law in the District of Columbia, it is not appealable to this Court on certiorari or otherwise. Citing *Busby v. Electric Utilities Employees Union,* 65 Supreme Court 142 323 U. S. 72

United Surety Company v. American Fruit Product Co., 35 Supreme Court 828, 238 U. S. 140.

2. The Petition for Certiorari Incorrectly Alleges That the United States Court of Appeals for the District of Columbia Misconceived the Law of Res Ipsa Loquitur in the Applicable Decisions of This Court and Misapplied the Law to the Facts in This Case.

It is true that both parties in the briefs filed in the United States Court of Appeals for the District of Columbia made reference to the decisions of this court in *Jesionowski v. Boston & M. R. R.*, 329 U. S. 452, 67 Supreme Court 401, and to the later case of *Johnson v. United States*, 333 U. S. 46, 68 Supreme Court 391. Respondents, through counsel from the very outset in the trial court, made it apparent that among the other decision relied upon to support their theory that *Res Ipsa Loquitur applied to* the facts of their cases against petitioner, were the two decisions just mentioned, and more particularly the decision of this Court in *Sweeney v. Irving*, 228 U. S. 233, 33 Supreme Court 416.

We respectfully state here that it is still our position that the law announced in those cases, does apply and was properly applied by the courts below in the case at bar.

We further respectfully assert that the decisions of the United States Court of Appeals for the District of Columbia, especially those cited by the Court in its written opinion, to wit, *Washington Loan & Trust Co. v. Hickey*, 78 U. S. App. D. C. 59, 61; 137 F. 2d. 677, 679, *Brown v. Capital Transit Co.*, 75 U. S. App. D. C 337, 338; 127 F. 2d. 329, 330, and *Washington Annapolis Hotel Co. v. Hill*, 84 U. S. App. D. C. 418; 174 F. 2d. 157 are in complete harmony with the decisions of this court, *supra* and are in accord with the greater weight of authority on this doctrine as shown by the decision and opinions of both Federal and state courts. 169 A. L. R. 953.

The decision and opinion of the Circuit Court is not in conflict with the decisions of said court in previously decided cases; if so, then the decisions of the cases cited on this point in petitioner's brief must be held to be reversed by the later cases, of said court commencing with the case of *Washington Loan & Trust Co. v. Hickey, supra,* and continued in unbroken sequence thereafter.

While we do not concede that the decision of the Circuit Court of Appeals in this case is in conflict (under the facts of the case at bar) with the decisions announced in *Gray* v. *Baltimore & O. R. Co.,* 24 F. 2d. 671, *Kramer v. Mills Lumber Co.,* 24 F 2d 313, or *Brown v. Dorney Park,* 167 F 2d 453, we respectfully say that if they are, then they are a definite minority view authority on this subject. Since we have applicable and governing decisions of the U. S. Circuit Court of Appeals for the District of Columbia, then the case at bar must be decided in accordance with those decisions. That is what was done.

The trial court as well as the Circuit Court of Appeals was correct in holding that the petitioner's request for an instruction on the doctrine of contributory negligence was without merit and should be denied. Petitioner cites as his authority here on that point the case of *J. Maury Dove Co. v. Cook,* 59 U. S. App. 61, 32 F. 2d 957. We respectfully call the court's attention to the fact that this case was decided May 6th, 1929, just about 5 years prior to the adoption of the Federal Rules of Civil Procedure, now binding upon all the Federal Courts. At the time of the trial of that case, a defendant was not required by rule of court to plead contributory negligence. Under Rule 8(c) of said Federal Rules it is stated: "AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively * * * CONTRIBUTORY NEGLIGENCE * * *". Petitioner never did file such a pleading in this case. There surely was no evidence of contributory negligence on the part of

either plaintiff to justify the application of the doctrine as a matter of law, and none to go to the jury as a question of fact, had petitioner ever claimed the application of the doctrine to the facts of the case at bar, until the trial was well under way.

Counsel for petitioner has laid great stress throughout the trial of the case on the theory that the doctrine of Res Ipsa Loquitur should not be invoked in this case because plaintiffs below were in as good a position from the date of the accident to explain to the jury the facts from which the cause of the accident could be explained as the petitioner itself. The undisputed facts show throughout the entire record that the spring which snapped off without warning and struck the respondent Elizabeth West in the eye, thereby destroying her eyesight in that eye, was attached at face level to the door and not at the top of the door to which it was attached. That as Mrs. West was pulling the door back so as to enter as an invitee, and was holding the door open so as to permit the witness Mrs. Howes to make exit therefrom with her infant child in a stroller, the spring broke as indicated. It was still hanging from the door after the accident and was then taken in custody by the manager of the defendant's store charged with the duty of gathering such evidence in the event of a claim being made. The spring was never produced by the defendant at the trial, nor was any satisfactory evidence offered to show what caused it to suddenly break off. Petitioner was given every opportunity of meeting the inferences of negligence on which respondents relied to sustain their claim, but elected to rely on other testimony which the jury, by its verdict obviously rejected as unsatisfactory to it.

The instructions allowed to petitioner (most of which were conceded by respondents counsel) were full and complete, and were in keeping with the applicable law of the case, including the doctrine of Res Ipsa Loquitur, and

petitioners were accorded every proper protection under the law.

CONCLUSION

It is respectfully claimed that the petition for certiorari is not a proper one to be granted by this court, for the reason hereabove given and that the petition should be dismissed and the writ denied.

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Attorney for Respondents